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In the Supreme Court of the United States

OCTOBER TERM, 1968

STATE OF OREGON, Ex Rel WESTERN SEED PRODUCTION COMPORATION,
Petitioner,

v.

J. R. CAMPBELL, As Judge of the Circuit Court of the State of Oregon for Malheur County,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

To The Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States

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To The Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States

Comes Now WESTERN SEED PRODUCTION CORPORATION and respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Oregon entered in the above entitled case on July 16, 1968.

OPINIONS BELOW

Appended at Pages 19 through 40 is the opinion of the Supreme Court of the State of Oregon entered in

an original mandamus proceeding commenced therein to review respondent's refusal to quash service of summons upon petitioner, which opinion is reported at 86 Or. Adv Sh. 957, — Or. —, 442 P.2d 215.

No written opinion was rendered by the Supreme Court of the State of Oregon in denying the petition for rehearing.

JURISDICTION

The judgment of the Supreme Court of the State of Oregon was dated and entered the 14th day of June, 1968 (R. 69)*, and on July 16, 1968, such judgment was made final when such Court, after considering petitioner's timely petition for rehearing, denied the same (R. 70).

On November 19, 1968, the Supreme Court of the State of Oregon entered its order recalling the mandate to respondent in the above entitled proceeding and suspending proceedings in the Court below pending timely submission to and disposition by this Court of a petition for writ of certiorari (R. 72).

This Court has jurisdiction to review the judgment in question by writ of certiorari by reason of *28 USCA 1257(3)* because rights claimed under the Constitution of the United States are involved.

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* The record is referred to herein as "R."

QUESTIONS PRESENTED

1. To what extent may a state authorize its courts to assume jurisdiction over an entity, which has never appeared therein, without infringing upon rights reserved by the Fourteenth Amendment to the Constitution of the United States of America (the "due process" clause)?

2. Was petitioner deprived of its property without due process of law in violation of such amendment because the courts of the State of Oregon purport to assert jurisdiction over petitioner based upon service of summons upon petitioner in Arizona?

3. Has the State of Oregon, by exposing all entities participating in the creation of an item to the necessity of defending, in Oregon, claims of economically dissatisfied customers, unreasonably burdened commerce between the states and invaded petitioner's right to be free of such burden as established by Article I, Section 8, Clause 3, of the Constitution of the United States of America?

CONSTITUTIONAL PROVISIONS AND STATUTES

1. *Constitution of the United States*, Amendment XIV, § 1:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any state deprive any person of . . . property, without due process of law . . ."

2. Constitution of the United States, Article I, § 8:

"The United States shall have power . . .

"To regulate commerce . . . among the several states."

3. 1 Oregon Rev. Statutes, § 14.035, p. 87:

"(1) Any . . . corporation whether or not a citizen or resident of this state, who, in person or through an agent, does any of the actions enumerated in this section, thereby submits such person . . . to the jurisdiction of the courts of this state, as to any cause of action or suit or proceeding arising from any of the following:

"(a) The transaction of any business within this state.

"(b) The commission of a tortious act within this state . . ."

"(2) Services of summons on any person who is subject to the jurisdiction of the courts of this state, as provided in this section, may be made by personally serving the summons and copy of the complaint upon the defendant outside this state . . . Such service shall have the same force and effect as though summons had been personally served within this state.

. . . . . ."

4. 1 Oregon Rev Statutes. § 72.6070(5), p. 520:

"Where the buyer is sued for breach of a warranty or other obligation for which his seller is answerable over:

(a) He may give his seller written notice of the litigation. If the notice states that the seller may come in and defend and that if the seller does

not do so he will be bound in any action against him by his buyer by any determination of fact common to the two litigations, then unless the seller after seasonable receipt of the notice does come in and defend he is so bound."

5. 1 Oregon Rev. Statutes, § 72.3140:

"(1) Unless excluded or modified as provided in ORS 72.3160, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind . . .

"(2) Goods to be merchantable must be at least such as:

. . . . .

(c) Are fit for the ordinary purposes for which such goods are used."

6. 1 Oregon Rev. Statutes, § 72.3150, p. 508:

"Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under ORS 72.3160 an implied warranty that the goods shall be fit for such purpose."

7. 1 Oregon Rev. States, § 72.1010, p. 499:

"ORS 72.1010 to 72.7250 may be cited as Uniform Commercial Code—Sales."

STATEMENT OF THE CASE

On January 10, 1967, the Oregon Supreme Court recited in substance that:

1. Arie and Catharina Bakker and Dick Groot had filed a complaint in the Circuit Court of the State of Oregon for Malheur County against the Amalgamated Sugar Company, West Coast Beet Seed Company and petitioner, alleging, inter alia:

(a) Plaintiffs' purchase of beet seed in Oregon;

(b) Plaintiffs' planting of such seed in Oregon, resulting in an "inferior and defective beet seed crop";

(c) That as a result of such seed and "resulting damage to plaintiffs' crop," plaintiffs suffered damage in the sum of $3,607.54;

(d) That petitioner participated in the production and distribution of such seed as a part of a joint venture with or was affiliated with the other defendants who were present and transacting business in Oregon;

(e) That petitioner distributed and multiplied this seed in Arizona with knowledge that it would thereafter be sold and distributed in Idaho and Oregon; and

2. Thereafter, pursuant to Ore. Rev. St. Sec. 14.035 plaintiffs caused petitioner to be served in Arizona with said complaint and summons in said action, and

3. Thereafter, petitioner appeared specially in the aforementioned Oregon Court and filed a motion to quash such service, appending thereto a supporting affidavit, which remains uncontradicted, establishing:

(a) That petitioner is an Arizona corporation engaged in the business of producing and selling beet seed in Arizona;

(b) That petitioner had no contact whatever with the State of Oregon;

(c) That petitioner was not involved in a joint venture with or affiliated with the other defendants;

(d) That it produced, sold and delivered the subject seed to a separate, independent entity defendant Amalgamated Sugar Company, in Cashion, Arizona (Page 19) and

4. J. R. Campbell, as Judge of the Circuit Court of the State of Oregon for Malheur County, on November 29, 1966, entered an order denying petitioner's motion to quash such service of summons and the complaint,

and issued an ALTERNATIVE WRIT OF MANDAMUS to J. R. CAMPBELL commanding him to vacate the aforementioned order of November 29, 1966, and to enter an order quashing purported service of summons and complaint upon petitioner and dismissing plaintiffs' complaint against the petitioner, or, to show cause why he had not done so (R. p. 43-46).

Whereupon, J. R. CAMPBELL, as Judge of such Circuit Court, demurred to such writ (R. p. 42) and filed his "abstract of record and brief," asserting (Def. Br. p. 24-42) that the State of Oregon was not prohibited by the "due process" clause of the United States Constitution from assuming jurisdiction because the record showed that petitioner had committed a tortious act therein by having:

> "purposefully done an act to avail himself of the privilege of conducting activities in Oregon—it has grown and sold sugar beet seed, knowing it was destined for Oregon, thus availing itself of Oregon's market for sugar beet seed" (Def. Br. p. 39).

At Page 20 of its responsive brief, petitioner, inter alia, asserted that the record did not disclose that it had the:

> "minimum contact" with the State of Oregon required by the United States Constitution as interpreted by this Court in *Hanson* v. *Denckla* (1958), 357 US 235, 2 L Ed 2d 1283)

J. R. CAMPBELL, in his reply brief, asserted that the sale in Arizona, with the knowledge that it might be used in Oregon, of seed which, when used, "caused the plaintiffs' sugar beets to bolt and go to seedy tops instead of producing normal beets, thereby resulting in a greatly reduced tonnage yield" (Def. Reply Br. p. 8-9), amounted to the commission of a tort within the state of Oregon.

In its opinion sustaining the demurrer, and by its

order denying petitioner's petition for a rehearing, the Oregon Supreme Court expressly held, contrary to petitioner's repeated assertion (Pl. Pet. for Reh. pp. 2-4) that the Fourteenth Amendment to the United States Constitution did not prohibit such state from asserting jurisdiction over petitioner.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

Petitioner submits that this Court should review the decision of the Supreme Court of the State of Oregon because:

I

It involves some of the most important, frequently appearing and erratically answered questions confronting the entire bench and bar of this nation, to-wit:

A. Is due process of law followed when the forum's long arm statute is enforced to provide jurisdiction over a defendant who had no contact with the forum except to participate in the production of an items which when used

(i) caused damage or injury in the forum, or

(ii) was not fit for the ordinary purpose for which it was sold (breaches an implied warranty).

B. The action of the Oregon Court was wrong and, unless restrained by this Court, is indicative of an oppressive, unnecessary burden which can be inflicted

upon nonresidents by a state through its "long arm statute."

ARGUMENT

I

This case presents important, frequently repeated and erratically answered questions which CAN BE ANSWERED ONLY BY THIS COURT.

A. Importance of the question

By our count thirty-eight states have enacted long arm statutes. Most, as pointed out by Justice Duniway in *Taylor* v. *Portland Paramount Corporation*, (9 Circuit 1967), 383 F.2d 634 at 640, have "construed their long arm statutes as going as far as the due process clause of the Fourteenth Amendment will let them go." Confusion and litigation can be eliminated if this Court will end speculation as to *how far it will "let them go."*

Not only will this Court's decision be helpful procedurally, but it will solve important substantive questions. Obviously, we all ought to know the extent of our vulnerability to suit outside of our home state, but, more importantly, commercial interests must know.

Forty-nine states, the District of Columbia and the Virgin Islands have enacted the uniform commercial code. As will be pointed out herein, this decision of the Oregon Court in effect nullifies provisions within this code (a) enabling parties to disclaim warranties (Oregon Revised Statute Sec. 72.3140), and (b) es-

tablishing a method of resolving disputes between parties in the chain of distribution. (Oregon Revised Statute Sec. 72.6070(5).

B. Frequency of the question

Since its publication in 1961, a pertinent leading case, *Gray* v. *American Radiator & Sanitary Corporation*, 22 Ill. 2d 432, 176 N.E.2d 761, has been cited *one hundred sixty-five times* according to Shepard's Illinois Citations.

In 1966 alone, in the United States District Court for the District of Oregon, one of the three judges wrote at least three opinions on the same subject, according to the citations in respondent's brief to the Oregon Court.

C. The erratic answers

In the following decisions the Courts have expressed the review that the mere presence of a product in the state of the forum and injury resulting in that state may be a sufficient "contact" satisfying due process:

Federal—

Harford v. *Smith* (1966, D.C. W. Va.) 257 F. Supp. 578.

State—

Gray v. *American Radiator & Standard Sanitary Corp.* (1961) 22 Ill. 2d 432, 176 N.E.2d 761; *Andersen* v. *National Presto Industries, Inc.* (1965) 257 Iowa 911, 135 N.W.2d 639; *Atkins* v. *Jones & Laughlin Steel Corp.* (1960) 258

Minn. 571, 104 N.W.2d 888; *Adamek* v. *Michigan Door Co.* (1961) 260 Minn. 54, 108 N.W.2d 607; *Ehlers* v. *United States Heating & Cooling Mfg. Corp.* (1963) 267 Minn. 56, 124 N.W.2d 824; *Metal-Matic, Inc.* v. *Eighth Judicial Dist. Court* (1966, Nev.) 415 P.2d 617.

However, the following decisions, mostly federal cases, express the view that a shipment of a product from outside the forum state to, and the occurrence of an injury in, the forum state is not of itself a sufficient "minimum contact" to satisfy due process.

Federal—

Velandra v. *Regie Nationale des Unines Renault* (1964, C.A. 6 Mich) 336 F.2d 292; *Mueller* v. *Steelcase, Inc.* (1959, D.C. Minn.) 172 F. Supp. 416, disapproved on other grounds; *Atkins* v. *Jones & Laughlin Steel Corp.*, 258 Minn 571, 104 N.W.2d 888; *Easterling* v. *Cooper Motors, Inc.* (1960, D.C. N.C.) 26 F.R.D. 1; *Pendzimas* v. *Eastern Metal Products Corp.* (1961, D.C. Minn.) 218 F. Supp. 524; *Di Meo* v. *Minster Machine Co.* (1963, D.C. Conn.) 225 F. Supp. 569; *Bisbee* v. *Safeway* (1966, D.C. Or.) 290 F. Supp. 337.

State—

Muraco v. *Ferentino* (1964) 42 Misc. 2d 104, 247 N.Y.S.2d 598; *Moss* v. *Winston-Salem* (1961) 254 N.C. 480, 119 S.E.2d 445; *Oliver* v. *American Motors Corp.* (1967) 70 Wash. 2d —, 425 P.2d 647; *Hodge* v. *Sands Mfg. Co.* (1966, W. Va.) 150 S.E.2d 793.

Moreover, a court which will grant jurisdiction based upon the mere presence of the item within the

forum where physical damage is involved could nonetheless, in the balancing process, conclude that due process prohibits assertion of jurisdiction for a claimant seeking merely an economic loss. See the New York case of *Frank Angelilli Construction Co.* v. *Sullivan*, 256 N.Y.S.2d 189, affirmed 261 N.Y.S.2d 993, at Dev. 211 N.E.2d 517.

There are a multitude of variable factors deemed important. For example, some courts like the Oregon Court, hold jurisdiction depends upon whether the product was produced with knowledge that it would be used in the forum (p. 29 in the Opinion appended).

A decision in this case will not only reveal "how far" the states may go but indicate "how" they may go.

II

The Oregon Court's decision was not only wrong, but establishes a dangerous precedent.

In *Hanson* v. *Denckla*, 357 U.S. 235, 78 S. Ct. 1228, this Court declared:

> ". . . (I) It is essential in each case (where a defendant is called upon to appear in a foreign tribunal) that there be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum . . . 357 U.S. at 253."*

This seems to clearly state that the defendant must *conduct an activity* within the forum state—appear

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* Matter in parentheses added for clarity.

or solicit therein by agent, letter, telephone or advertising media. How can the sale and delivery of an item in Arizona to a separate independent person amount to the conducting of activities within Oregon?

In any event, the Oregon Court's action is contrary to the rule declared by this Court in *International Shoe Company* v. *Washington*, 326 U.S. 310, 66 S. Ct. 154 (1945), in that maintenance of the action offends traditional notions of fair play and substantial justice because:

(1) It is not necessary where questions of quality are concerned to require everyone who may have had something to do with the production of the item to journey to the home of the consumer in order to give the consumer an adequate remedy. As can be seen from the complaint served upon petitioner and Section 72.3140 of the Oregon Revised Statutes, the claimants have a perfectly good remedy against their supplier, Amalgamated Sugar Company, for breach of the implied warranty of merchantability. Moreover, the Uniform Commercial Code, for example Oregon Revised Statutes Sec. 72.3150, assures use of the most convenient forum. The damage issue will be tried where the product is used (Consumer v. Amalgamated) and the non-residents liability, if any, over to his purchaser (Amalgamated v. Petitioner) will be tried where that sale occurred.

(2) Problems of quality, and regardless of the "negligence label" attached to this claim, the facts reveal that it is a problem of quality (every breach

of an implied warranty can be, apparently, converted into a negligence claim by alleging that the producer negligently failed to inspect the item before selling it) are customarily handled by agreement because these problems can be *contractually* anticipated and guarded against, whereas true negligence situations cannot be anticipated and prevented by contract. All of the contracts in the world will not keep an accident from happening, but a person can investigate quality or obtain promises assuring quality and buy elsewhere, if dissatisfied;

(3) Because such matters are essentially consentual, a person in petitioner's position has always been entitled by law to place the risk of consumer satisfaction upon another; that is, it may sell only with the understanding that its purchasers will be responsible for consumer satisfaction, yet this statutory right (Uniform Commercial Code found in Section 72.3140 of Oregon Revised Statutes) is nullified if the consumer need only state its claims in terms of "negligence";

(4) It is also unfair for the State of Oregon to apply a different standard to petitioner than is applied to protect other nonresident defendants, to-wit, where jurisdiction is based upon a plaintiff's assertion of fact, the Oregon Court has always required a detailed statement permitting the Court to determine for itself, assuming the truth of the averment, if jurisdiction exists. For example, see *Dixie Meadows Independent Mine Company* v. *Knight*, 150 Or. 395, 45

P.2d 909, and *State ex rel Carroll* v. *Redding*, 83 Or. Adv. Sh. 251, — Or. —, 418 P.2d 846. Had the plaintiffs in the case at bar also been required to state the probative facts required to establish jurisdiction, the Oregon Court would have been able to see clearly that no jurisdiction exists.

By applying its long arm statute in the manner described herein, the State of Oregon also burdens interstate commerce in a manner prohibited by Article I, Section 8, of the Constitution of the United States of America. If everyone participating in the production of an item may be required to defend actions maintained by any ultimate consumer who believes the product "defective" or "inferior," and who is willing to speculate that this was the result of the producer's lack of due care, commerce is burdened by the unnecessary, uneconomic cost of defendant nuisance claims. "Unnecessary" because the consumer already has an adequate remedy against his local supplier. A state, in the exercise of its police power, may reasonably burden commerce in order to provide a remedy for personal injury victims, but it would seem that the burden becomes unreasonable when it improves the coercive power of every purchaser who claims some economic loss by virtue of its purchase.

CONCLUSION

Involving seed, as it does, this case is material for a parable and as such can serve as a guide in a multitude of situations. Petitioner respectfully submits that this is the kind of case permitting the most effective use of this Court's limited time.

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APPENDIX A

No. 8852—June 14, 1968

IN THE SUPREME COURT OF THE STATE OF OREGON

IN BANC

STATE EX REL WESTERN SEED PRODUCTION CORPORATION, *Plaintiff*, *v.* CAMPBELL, *Defendant.*

Original proceeding in mandamus.

Argued and submitted on defendant's demurrer to alternative writ September 7, 1967.

Before PERRY, Chief Justice, and MCALLISTER, SLOAN, O'CONNELL, GOODWIN, DENECKE and HOLMAN, Justices.

DEMURRER SUSTAINED; WRIT DISMISSED.

GOODWIN, J.

This is an original mandamus proceeding to review the trial court's refusal to quash service of summons upon Western Seed Production Corp., an Arizona corporation. The validity of the challenged "long-arm" service, under ORS 14.035,[1] depends upon whether the originating complaint alleges the "commission of a tortious act within this state." ORS 14.035(1)(b). There is no allegation of facts that constitute "the" transaction of any business within this state." ORS 14.035(1)(a).

In this opinion, we will refer to the parties as they are designated in the pending damage action. The

[1] The text of ORS 14.035 is set forth at page 4 of this brief.

complaint therein alleges that the plaintiffs are Oregon sugar-beet growers who purchased through their local supplier seed which had been propagated by Western Seed in Arizona and then sold in Arizona to the plaintiffs' supplier. The supplier and Western Seed are both named as defendants in the damage action. Plaintiffs claim that defects in the seed caused crop losses and that because their land was occupied for one year in growing a worthless crop their property was damaged. Plaintiffs seek to hold Western Seed responsible for a breach of implied warranty and, in the alternative, on the theory of negligence. If plaintiffs have stated a cause of action on either theory, then it will be necessary to consider whether, for the purposes of "long-arm" jurisdiction, a "tortious act" has been committed within this state.

I. IMPLIED WARRANTY

In *Price v. Gatlin*, 241 Or 315, 405 P2d 502 (1965), we held that a purchaser of a defective tractor could not hold the wholesaler, with whom he had no contract, strictly liable where the defect had resulted only in a loss of profits to the purchaser's business. In the present case, plaintiffs lost the profits they expected to derive from a normal sugar-beet crop. There was no damage to their land; there was only a loss of use thereof. The alleged damage is, therefore, essentially of the same character as that suffered in *Price v. Gatlin*.

The pending action, in the context of mandamus, is against a producer rather than against a wholesaler. But since each case involved a remote seller, there is no substantive basis on these facts for distinguishing *Price v. Gatlin*. In either situation, the question is whether a purchaser of a defective product who

suffers only economic loss should be allowed to maintain an action for breach of warranty against one with whom he has had no dealings.

A buyer's interest in obtaining what he has bargained for is protected by the law of sales. Statutory sales law has recently undergone comprehensive review and revision in the Uniform Commercial Code. ORS ch 72. The code provides a scheme of warranty recovery, in which fault is irrelevant, for all types of loss resulting from "unmerchantable" products. Remedies under the code are subject to certain conditions not associated with common-law tort actions: notice of breach of warranty must be given, ORS 72.6070; remedies for breach of warranty can be limited, ORS 72.7190; certain warranties can be disclaimed, ORS 72.3160. Further, the statute of limitations for warranty actions is four years, ORS 72.7250, while in tort actions it is two years, ORS 12.110. The code is silent, however, as to privity requirements for breach-of-warranty actions. This aspect of sales law has been left to the courts in jurisdictions adopting the code. See Comment 2 to ORS 72.3130, in *Oregon's Uniform Commercial Code*, published in 1962 by the Legislative Counsel Committee.

Because of social pressure to compensate innocent victims of personal injuries, and because remedies for such injuries have traditionally been provided by tort law, this court has joined those which have abolished privity requirements in actions for personal injuries from defective products. We have assumed that such a cause of action sounds in tort and thus is unhampered by the statutory impediments to relief for breach of warranty. See *Heaton v. Ford Motor Co.*, 85 Or Adv Sh 823, — Or —, 435 P2d 806 (1967); *Wights v. Staff Jennings, Inc.*, 241 Or 301, 405 P2d

624 (1965). Where a product is defective within the meaning of the Restatement (Second) of Torts § 402A (1965) and causes personal injury, the injured party can recover for his injuries against any seller of the defective product, without regard to such warranty notions as notice disclaimer, or whether the warranty was express or implied.

Where the damages sought do not involve personal injury, however, this court has not yet decided to abandon the traditional remedies under the law of sales. In *Heaton v. Ford Motor Co.*, supra, a personal-injuries case, we said that products liability was a form of strict liability as formulated in the Restatement (Second) of Torts § 402A. We had no occasion then to decide, and do not now decide, whether strict liability should be imposed upon remote sellers of products which cause property damage instead of personal injury. The application of Section 402A to property damage is, in this state, an open question.

The risk that a product may not perform as it should exists in every purchase transaction. A buyer who chooses his seller with care has an adequate remedy should any warranties be breached. A buyer whose seller proves to be irresponsible will understandably seek relief further afield. But to allow a nonprivity warranty action to vindicate every disappointed consumer would unduly complicate the code's scheme, which recognizes the consensual elements of commerce. Disclaimers and limitations of certain warranties and remedies are matters for bargaining. Strict-liability actions between buyers and remote sellers could lend themselves to the proliferation of unprovable claims by disappointed bargain hunters, with little discernible social benefit. Because the buyer and his seller

will normally have engaged in at least one direct transaction, litigation between these parties should ordinarily be simpler and less costly than litigation between buyer and remote seller. For these reasons we retain the rule stated in *Price v. Gatlin*, supra: Where the purchaser of an unmerchantable product suffers only loss of profits, his remedy for the breach of warranty is against his immediate seller unless he can predicate liability upon some fault on the part of a remote seller.

Plaintiffs, therefore, have not stated a cause of action for breach of warranty against Western Seed, a remote seller. It follows that in the attempted statement of a warranty cause of action the plaintiffs have described no "tortious act committed within this state."

II. NEGLIGENCE

Though no cause of action for breach of warranty has been stated against Western Seed, the plaintiffs have also alleged negligence. We must decide, therefore, whether the buyer's interest in having a product perform as it should is one that is protected against negligent invasion by a party not privy to the contract of sale. A number of cases have allowed negligence recovery against remote sellers, with fault taking the place of privity. See *Atlas Aluminum Corp. v. Borden Chemical Corp.*, 233 F Supp 53 (ED Pa 1964); *Spence* v. *Three Rivers Supply*, 353 Mich 120, 90 NW2d 873 (1958); *Lang* v. *General Motors Corp.*, 136 NW2d 805 (N Dak 1965). Cf. *Fisher* v. *Simon*, 15 Wis2d 207, 112 NW2d 705 (1961) (dictum, discussing homebuilder's liability to nonprivity purchaser). Closest to the facts of this case was one where recovery was allowed for crop losses resulting from

negligently mislabeled seed. See *Hoskins* v. *Jackson Grain Co.*, 63 So 2d 514 (Fla 1953).

Ather courts have held either that negligence liability will not be imposed for purely economic loss or that negligence liability is limited to situations in which the loss occurred in a violent or dangerous accident. See, e.g., *Wyatt* v. *Cadillac Motor Car Division*, 145 Cal App 2d 423, 302 P2d 665 (1956) (dictum) disapproved on related grounds, *Sabella* v. *Wisler*, 59 Cal 2d 21, 377 P2d 589, 27 Cal Rptr 689 (1963)); *Trans World Airlines* v. *Curtis-Wright Corp.*, 1 Misc 2d 477, 148 NYS2d 284 (1955).

A buyer's desire to enjoy the benefit of his bargain is not an interest which tort law has traditionally been called upon to protect. It is in this tradition that we have declined, in the absence of fault, to impose upon remote sellers strict liability to insure customer satisfaction. The statutory sales law has set out a scheme of warranty liability in which the element of fault is irrelevant so long as the buyer proceeds against his seller. Fault becomes relevant where the loss of the benefit of the bargain is traceable to the negligence of a remote seller. Recovery for such negligence, because it is grounded upon fault, falls within traditional tort rules and presents no serious conflict with the statutory system of nonfault recovery under the Uniform Commercial Code.

Where the other elements of a negligence case are present, we see no reason why the availability of a tort remedy should depend upon whether the harm was traumatic. The manufacturer should have a duty of exercising due care to avoid foreseeable harm to the users of his product. As stated by one writer, economic loss from defective products is "within the range of

reasonable manufacturer foresight * * * [and this foreseeability] should raise at least a duty of due care unless some compelling economic or social or administrative reason dictates otherwise." Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective Product Cases*, 18 Stan L Rev 974, 989 (1966). Not being aware of any such reasons, we hold that a complaint states a cause of action in tort when it alleges that the defendant negligently reproduced and sold seed which caused plaintiffs to lose the expected profit from their crop.

III. FOREIGN ACT—LOCAL INJURY

Having decided that the complaint under examination alleges a cause of action in tort, it now becomes necessary to decide whether ORS 14.035 applies. The allegations, in effect, are that the defendant's negligence outside the state caused a loss inside the state.

Many courts, construing similar "long-arm" statutes, have exercised jurisdiction in the foreign-act-local-injury situation. See *Gray* v. *Amer. Radiator & Sanitary Corp.*, 22 Ill 2d 432, 176 NE2d 761 (1961); and see cases cited in Note, *In Personam Jurisdiction over Nonresident Manufacturers in Product Liability Actions*, 63 Mich L Rev 1028, 1036-1040 (1965).

The Illinois rule is significant in this case because the Oregon statute was copied from the Illinois statute after the *Gray* case had been decided. When one state borrows a statute from another state, the interpretation of the borrowed statute by the courts of the earlier enacting state ordinarily is persuasive. See *Fleischhauer v. Bilstad et al*, 233 Or 578, 379 P2d 880 (1963) (presumption that other state's interpretation is governing); *School Dist. No. 1 v. Rushlight and*

Co., 232 Or 341, 345, 375 P2d 411 (1962). And see *Vandermee v. District Court*, — Colo —, 433 P2d 335 (1967) (adopting Illinois interpretation of similar long-arm statute).

That the Illinois construction was probably intended by the Oregon legislature may be inferred from reports of the bar committee which advocated the legislation. See Levin, *The "Long Arm" Statute and Products Liability*, 4 Willamette L J 331 (1967). In New York, a long-arm statute modeled after the Illinois statute was interpreted to be inapplicable where a foreign act caused an injury in New York. See *Longines-Wittnauer v. Barnes & Reinecke; Feathers v. McLucas; Singer v. Walker*, 15 NY2d 443, 209 NE2d 68, 261 NYS2d 8 (1965) (consolidated cases). The 1966 New York legislature responded to these decisions by amending the statute so that it specifically refers to an act outside the state causing injury within the state. N.Y. Civ Prac. Law § 302(a) (3), (McKinney Cum Supp 1967). Such a demonstration of legislative intent should not be made necessary in Oregon.

The Illinois statute was intended to exploit the outer limits of due process in aid of Illinois litigants. See Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U Ill L F 533. It is reasonable, therefore, to hold that a statute modeled after the Illinois statute should be interpreted in Oregon as broadly as constitutional due process will permit.

IV. DUE PROCESS

The next question is whether due process permits an Oregon court to obtain personal jurisdiction over Western Seed in this case. The traditional rule that

state jurisdiction over a person required personal service within the state has been weakened by *Internat. Shoe Co. v. Washington*, 326 US 310, 66 S Ct 154, 90 L Ed 95, 161 ALR 1057 (1945). *International Shoe* held that corporate presence within the state, by doing business there or otherwise, was not necessary for personal jurisdiction. Due process was said to require that the individual or entity served outside the state have certain minimum contacts with it so that the maintenance of the action would not offend traditional notions of fair play and substantial justice. 326 US at 316.

In *McGee* v. *International Life Ins. Co.*, 355 US 220, 78 S Ct 199, 2 L Ed 2d 223 (1957), the court expanded upon the *International Shoe* doctrine to uphold California's assertion of jurisdiction over a Texas insurance company whose only contact with California consisted of soliciting the insured to buy the policy being sued upon and accepting premiums mailed from California. The court's discussion of the fairness of forcing the defendant to defend in California emphasized that burdens on foreign defendants had been lessened by modern communication and transportation advances, that California had an interest in providing a forum for its residents insured by out-of-state companies, and that because the important witnesses resided there California was the most convenient place for the trial.

In *Hansen* v. *Denckla*, 357 US 235, 78 S Ct 1228, 2 L Ed 2d 1283 (1958), Florida's assertion of personal jurisdiction over a Delaware corporate trustee was invalidated as contrary to due process. The trustee's only contact with Florida was correspondence with the settlor of the trust had moved to Florida. The court stated:

> "[Due process limitations] * * * are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States * * *." 357 US at 251.

The court also observed:

> "* * * [I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws * * *." 357 US at 253.

Hanson v. *Denckla* thus adds to the fairness test of *International Shoe* an objective element: a purposeful act by the defendant. The requirement of a purposeful act by the defendant prevents the seizing by a forum of bootstrap jurisdiction based upon the unilateral act of the plaintiff.

In deciding whether due process allows the assertion of jurisdiction over an out-of-state manufacturer solely on the ground that his defective product has caused a loss within the forum state, the courts have not been unanimous. Some have held that due process is not satisfied if the only contact with the state asserting jurisdiction was an act outside the state with resultant loss within. See, e.g., *Erlanger Mills* v. *Cohoes Fibre Mills*, 239 F2d 502 (4th Cir 1956); *Mann* v. *Equitable Gas Company*, 209 F Supp 571 (ND W Va 1962); *Moss* v. *Winston-Salem*, 254 NC 480, 119 SE2d 445 (1961); *Hodge v. Sands Manufacturing Company*, — W Va —, 150 SE2d 793 (1966).

Other cases, however, have upheld jurisdiction over out-of-state manufacturers whose products have caused losses within the forum state. See, e.g., *Van-*

dermee v. *District Court*, supra; *Andersen v. National Presto Industries*, 257 Iowa 911, 135 NW2d 639 (1965); *Gray v. Amer. Radiator & Sanitary Corp.*, supra; *Ehlers v. U. S. Heating & Cooling Mfg. Corp.*, 267 Minn 56, 124 NW2d 824 (1963); *Golden Gate Hop Ranch, Inc.* v. *Velsicol Chemical Corp.*, 66 Wash 2d 469, 403 P2d 351 (1965).

In the cases upholding jurisdiction the controlling idea seems to be that manufacturers who seek a nationwide market for their wares ought to prepare at the same time to defend themselves in the courts of the states in which defective products may injure consumers. The idea conforms to the fairness principle of *International Shoe* as well as to the economic facts of life.

The *Hanson* v. *Denckla* emphasis on the defendant's act in purposefully invoking the benefit and protection of the forum's laws is satisfied where a seller undertakes to exploit the market in any state where customers may be found for his products.

> "* * * Where a defendant does business of such volume, or with such a pattern of product distribution, that he should reasonably anticipate that his product may ultimately be used in any state, he has done the act required for the exercise of jurisdiction by the state where the injured user resides * * *." *Keckler v. Brookwood Country Club*, 248 F Supp 645, 648 (ND Ill 1965).

In the case at bar, the plaintiffs have asserted that Western Seed propagated and multiplied defective seed in Arizona knowing that the seed would be planted by growers in Oregon and Idaho. Such allegations sufficiently describe conduct producing foreseeable consequences in Oregon and circumstances justifying long-arm jurisdiction in this case.

If Western Seed had established by its affidavits supporting its motion to quash that the sale out of which the pending action arose was an isolated transaction, and that Western Seed did not engage in interstate commerce, we might have a different question.

Western Seed has relied primarily on the ground that it does not do business in Oregon (a matter relevant under a different section of the long-arm statute), and upon the nature of the harm (economic loss rather than personal injury), together with the asserted faultfree nature of its conduct (growing seed), for the proposition that no tort has been committed in Oregon.

In view, however, of our analysis of the factual situation alleged in plaintiff's complaint and of the relevant law derived from the decisions which have been called to our attention in cases dealing with similar problems, we hold that the complaint does state a cause of action for negligence and a resulting loss under circumstances in which jurisdiction can be obtained under ORS 14.035(1)(b).

The demurrer to the alternative writ of mandamus is sustained, and the writ is dismissed.

O'CONNELL, J., concurring in part; dissenting in part.

With the adoption of the majority opinion it would appear that the Oregon law of products liability can now be roughly summarized as follows:

Personal Injury

A seller, either remote or immediate, who is negligent in selling a defective product is liable for personal injuries. Similarly, both a remote and

immediate seller are liable for personal injuries resulting from the sale of an article unreasonably dangerous. In none of these instances is liability predicated upon the Uniform Commercial Code.

Property Damage

Immediate and remote sellers are liable for property damage resulting from negligence in selling a defective product. This liability is not predicated upon the Uniform Commercial Code.

An immediate seller is strictly liable for property damage.[1] Liability may arise either upon an express or an implied warranty. The liability is predicated upon the Uniform Commercial Code.

Whether a remote seller would be strictly liable for property damage resulting from the sale of an unreasonably dangerous product is left open by the majority opinion. If the court were to recognize strict liability under these circumstances, I assume that it would be based upon Section 402A of the Restatement of Torts (Second) and not upon the Uniform Commercial Code.

Loss of Bargain and Loss of Profits

An immediate seller is strictly liable for loss of bargain or loss of profits. Liability may arise either upon an express warranty or an implied warranty and is predicated upon the Uniform Commercial Code.

It is not clear from the opinion whether the remote seller is liable for a loss of bargain or loss

[1] In the interest of brevity the extensive footnotes appearing in the dissent are not reproduced here.

of profits resulting form a breach of express warranty. He is not liable on a theory of implied warranty under the Code. The remote seller is liable for loss of bargain or loss of profits resulting from negligence in selling a defective product. This liability is not predicated upon the Uniform Commercial Code. Whether a remote seller would be strictly liable for loss of profits or loss of bargain resulting from the sale of an unreasonably dangerous product is left unresolved by the majority opinion.

The foregoing summary points up some very interesting features in our treatment of the law of products liability in this state. First, it should be noted that the law described in the summary is fashioned in part by this court and in part by the legislature under the Uniform Commercial Code. This allocation of the law-making function has been made by the court, but the basis upon which the allocation is made is not entirely clear. Thus, although the Code contains provisions which evidence a legislative purpose to deal with the liability for *personal injuries* arising out of the sale of a defective product we have, without explanation, deemed this aspect of the law of sales to fall outside of the provisions of the Code. Likewise, we have allocated to this court the functions of developing the law relating to the liability for loss of bargain or loss of profits resulting from the seller's negligence and possibly from the sale of an unreasonably dangerous product. On the other hand, we have decided that the Code has pre-empted the law relating to liability for loss of bargain or loss of profits resulting from non-negligent sales by immediate sellers of defective products not unreasonably dangerous.

In the case at bar the majority attempts to explain

the foregoing legislative pre-emption of the law relating to the remote seller's liability for loss of bargain or loss of profits. The explanation is very difficult to follow. It begins with the thought that buyers are aware of the risk that "a product may not perform as it should" and that by choosing their sellers "with care" buyers can obtain a warranty and thus be provided with an "adequate remedy." Although my criticism does not center here, it should be noted in passing (as it has been noted in the cases) that in the purchase of many products the buyer does not have this power to bargain for protection; if the buyer wants the product he must take it upon the terms of an "adhesion contract" designed by the seller for his own protection. The court goes on to explain that to allow a non-privity *warranty* action to vindicate every disappointed consumer "would unduly complicate the code's scheme." Since the "code's scheme" is described in terms of "the consensual elements of commerce," I assume that the court is discussing liability under an *express* warranty and one which is "bargained" for between a buyer and his *immediate* seller.

The majority's analysis of the Code's provisions is unacceptable to me for a number of reasons. At the outset it should be observed that the Code was not designed to confine the buyer's warranty remedy to actions against the immediate seller. The official comment appended to the Code makes it clear that the liability of the remote seller was left for the courts to work out through case law. This is made clear in the official comment to ORS 72.3130 (the section dealing with express warranties):

> "2. Although ORS 72.3130 is limited in its scope and direct purpose to warranties made by the seller to the buyer as part of a contract for

> sale, the warranty sections of ORS 72.1010 to 72.7250 are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract. * * * The provisions of ORS 72.3180 on third party beneficiaries expressly recognize this case law development within one particular area. Beyond that, the matter is left to the case law with the intention that the policies of the Uniform Commercial Code may offer useful guidance in dealing with further cases as they arise."

I read the Code to mean that the court is free to adopt a rule imposing liability upon a remote seller for the breach of an *express* warranty (whether or not the remote buyer bargained for the warranty) or for breach of an *implied* warranty, or on some other theory not couched in terms of "warranty." I believe that the drafters of the Code and the legislature did not have the fears expressed in the majority opinion that "to allow a non-privity warranty action * * * would unduly complicate the Code's scheme."

Considering first the liability of a remote seller upon an "express warranty," I assume from what the majority has written that an action upon an "express warranty" cannot be brought in Oregon against a remote seller. This I gather from the court's insistence that the liability arise out of a "consensual" transaction, that it be keyed to remedies which are "matters for bargaining" and from the observation that "actions between buyers and remote sellers would lend themselves to the proliferation of unprovable claims by disappointed bargain hunters, with little social benefit."

That this view is not compelled by the Code is demonstrated by the case of *Seeley* v. *White Motor Co.*, 45 Cal Rptr 17, 403 P2d 145 (1965) decided by the California Supreme Court. In that case the court held that the remote seller was liable to a purchaser for loss of profits upon the theory of a breach of express warranty. As Mr. Justice Peters pointed out in dissent, the remote seller's liability could not have rested upon the basis of a "bargain" because the purchaser did not rely upon the warranty—he testified that he was unaware of any representation made by the remote seller.

In the present case the more serious defect in the court's analysis is the failure to consider the liability of the remote seller upon the theory of *implied* warranty. This is the very heart of the problem in this case and we should face up to it. Contrary to the majority's characterization, the Code's "scheme" is not simply to deal with liability arising out of a "consensual" exchange between seller and buyer in which the parties "bargain" with respect to the seller's liability. The Code also deals with the liability of the seller upon an *implied* warranty. That liability is not consensual. It is now pretty well agreed that liability upon an implied warranty is essentially strict liability in tort and should be dealt with on that basis.

The majority opinion concedes that the purchaser can recover from the *immediate* seller for loss of profits. It is not made clear whether this liability would arise only out of an express warranty or whether it would also extend to an implied warranty. The majority opinion makes it appear that the only question is one of establishing the limits on *who* may be sued and concludes that the remote seller cannot be.

The reasons given relate to notions of consensuality and bargaining and to the social benefits which flow from avoiding the "proliferation of unprovable claims" and in reducing the costs of litigation ("benefits," incidentally, which do not seem to have any significance when the court considers the liability of a non-privity defendant based upon *negligent* conduct).

The crucial question in this case is not whether liability for loss of profits should artificially be limited to immediate sellers, but whether reasons exist for holding all sellers, immediate or remote, strictly liable to a purchaser for loss of profits. If there is a policy justification for imposing strict liability then it is inappropriate to attempt to delimit the range of potential defendants according to notions of privity. To relate this more important question to the Uniform Commercial Code and its coverage, I would first ask whether an immediate seller can be liable under the Code for loss of profits.

We have held under the Sales Act that in actions by the buyer against his immediate seller for breach of an implied warranty he may recover for loss of profits. I assume that the same result would be reached under the Code (ORS 72.7150). As I have previously pointed out. the liability imposed for breach of an implied warranty is simply another way of saying that there is strict liability in tort. Once the liability is identified as tortious rather than contractual in character, it is difficult to see why any distinction should be made between the liability of an immediate and a remote seller. The distinction becomes especially tenuous when the product is sold through an integrated marketing porcess in which the manufacturer, the distributor, and the retailer constitute, in effect, one

selling organization. But even where the marketing process is not integrated, I can see no reason for making a distinction between a seller who is in privity with the buyer and a seller who is not.

As I previously indicated, it is more important that we explain why strict liability should or should not be imposed upon a seller, whether he is immediate or remote. The reason for imposing strict liability upon a seller or upon any other class of defendants is difficult to formulate. It is not enough to say, as some courts have, that the seller is liable simply because he is the better or more convenient risk bearer. As we explained in *Wights* v. *Staff-Jennings*, 241 Or 301, 405 P2d 624 (1965), this proves too much and would serve as well to explain why persons other than sellers should be held strictly liable for another's loss.

The rationale for imposing liability in any case ultimately calls for the acceptance of some scheme of values. Generally we look for this scheme in the norms established by the community. It is necessary to determine how these norms are to be applied in relation to the sellers of goods. Although, as Judge Learned Hand points out, these norms are "not susceptible of any quantitative estimate," they must be identified in some fashion if they are to be weighed. The law assumes that either the court or the jury, in the exercise of their respective functions, will be able to determine what these values are and to weigh them. Sometimes these values are described in terms of "moral" values with the connotation of fault and the norm then is the moral sense of the community. On the other hand, they may be expressed simply in terms of social values unrelated to individual fault and the norm then becomes one of social efficiency in distributing and adjusting losses.

Whether we characterize the actor's conduct as innocent or blameworthy would seem unimportant. The more one studies the problem the clearer it becomes that liability "without fault" and liability "with fault" (i.e., liability for negligent, intentional conduct, etc.) are both a part of a single graduated scale of legal responsibility which measures the actor's conduct in terms of the probability of harm inherent in the conduct, the social value or utility of defendant's conduct, the social value of plaintiff's interest, and the interest of the public generally.

Plaintiff bases his claim in this case upon that aspect of implied warranty (or more properly strict liability) which permits recovery for what I have described as "innocent misrepresentation." This representation is "that the goods sold conform to the standard of quality generally attributable to goods of that description, and that they are reasonably fit for the purpose for which they are designed." Since the representation is deemed to arise, not by virtue of a contract between the seller and buyer but by operation of law it may be regarded as having been made not only by the immediate seller but by the remote seller as well. Both should be liable or neither should be liable. It is not enough to say that historically only the immediate seller was held liable. Some reason must be given for perpetuating the distinction. I know of none.

In imposing liability upon the seller for breach of an implied warranty the courts have not, generally speaking, explained adequately the basis for implying the representation.

I attempted to do so in *Price* v. *Gatlin*, 241 Or 315, 319, 405 P2d 503, 504 (1965). I suggested a rationale

for the imposition of liability upon the seller for loss of profits and for personal injury and property damage. There I strove to differentiate between liability based upon the innocent misrepresentation of a seller (which would require the recognition of a new tort form) and liability based upon conduct, other than the seller's representation. The distinction was imperfectly expressed, but it was an effort to isolate two separate grounds for imposing strict liability upon the seller. Restated, I would impose strict liability upon a seller of a defective product for loss resulting from a representation by the seller justifiably relied upon by the purchaser.

I went on to suggest that liability could be explained even in the absence of a misrepresentation strictly defined by resting it upon the principle that a seller should not be permitted to impose an unfair "sale" upon those who are not in a position to bargain for the terms of the sale. This is just another way of expressing the general feeling of the community that one who engages in an activity for gain and who is in a position to dictate the terms of the sale should not be able to disclaim all responsibility to the victim. When either of these elements expressed in *Price* v. *Gatlin*, *supra*, is identified in a particular transaction,—i.e., reliance upon a misrepresentation or imposition of unfair terms—it is unnecessary to show that the conduct created a high risk.

On the other hand, where the emphasis is on the high probability of loss resulting from the activity, the crucial factor is not the seller's representations or superior bargaining position. Instead, as we held in *Wights* v. *Staff-Jennings*, *supra*, we apply the principle under which liability is imposed for ultrahazard-

ous conduct, thus integrating the law relating to defective products with the law of torts generally. The principle reflects the feeling in the community that one who deliberately chooses to engage in a type of conduct having a high risk potential should compensate the victims of that activity.

When the basis for the seller's liability for the sale of a defective product is explained by identifying and weighing the values of the community, there is no sound reason for distinguishing the liability of the immediate and remote seller. Moreover there is no reason for assuming that the Uniform Commercial Code was intended to make applicable to those two classes of sellers a different rule of liability for defective goods causing expectation losses.

SLOAN and DENECKE, JJ., join in this opinion.